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December 12, 1995

The Honorable Susan Gerard
Arizona House of Representatives
State Capitol Complex
Phoenix, Arizona 85007

Re: I95-16 (R95-33)

Dear Representative Gerard:

You have asked whether the Arizona Consumer Fraud Act, A.R.S. §§ 44-1521 through -1534, makes it unlawful for an advertising retailer ("advertiser") to use the manufacturer's suggested retail price ("MSRP") in comparison advertising when neither the advertiser nor its competitor(s) sells the advertised products at the MSRP. We conclude that the Arizona Consumer Fraud Act prohibits the use of the MSRP in advertising if neither the advertiser nor its competitor(s) has made regular or substantial sales at the MSRP.

Background

As the term suggests, MSRP is the retail price at which the manufacturer suggests its products be sold. The MSRP's purpose is to indicate the price at which products are generally sold at retail. 16 C.F.R. § 233.3(d) (1995). Today, retailers often do not use MSRP as a selling price, but as a price with which to compare their own lower price. 16 C.F.R. § 233.3(c). Retailers occasionally make such a comparison in their advertising. Such advertising, as discussed below, has the potential of misleading consumers because it does not reflect dollars actually saved by consumers. 16 C.F.R. § 233(a).

Analysis

A brief overview of Arizona's Consumer Fraud Act ("the Act"), A.R.S. §§ 44-1521 through -1534, is helpful in answering your question. The Act makes it an unlawful practice to use any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with

the intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement[1] of any merchandise. A.R.S. § 44-1522(A).

According to A.R.S. § 44-1522(D), the Arizona Legislature intended that Arizona courts use the interpretations by the Federal Trade Commission ("FTC") and federal courts of the Federal Trade Commission Act ("FTCA") as a guide in construing the Arizona Act. In interpreting the FTCA, federal courts have held that if the "first contact" advertising is deceiving, the fact that consumers subsequently learn the truth before purchase is irrelevant. *Resort Car Rental System, Inc. v. Federal Trade Comm'n*, 518 F.2d 962 (9th Cir.), *cert. denied*, 423 U.S. 827 (1975).

The FTC, sensitive to the fact that many believe the MSRP is a price at which merchandise is sold, promulgated advertising price guidelines that specifically address your question. *See* 16 C.F.R. § 233.3 (a) - (i) (1995). The FTC recognized the widespread, deceptive use of MSRP as a reference price. In its advertising price guidelines, the FTC states:

> (c) There would be little problem of deception in this area if all products were invariably sold at the retail price set by the manufacturer. However, the widespread failure to observe manufacturer's suggested or list prices, and the advent of retail discounting on a wide scale, have seriously undermined the dependability of list prices as indicators of the exact prices at which articles are in fact generally sold at retail. Changing competitive conditions have created a more acute problem of deception than may have existed previously. Today, only in the rare case are all sales of an article at the manufacturer's suggested retail or list price.

Having found this practice to be deceptive, the FTC promulgated the following guideline:

> (f) . . . a retailer who advertises a manufacturer's or distributor's suggested retail price should be careful to avoid creating a false

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[1] A.R.S. § 44-1521(1) defines "advertisement" to mean "the attempt by publication, dissemination, solicitation or circulation, oral or written, to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise." This definition encompasses representations made in paid media as well as those made on price-tags and by sales representatives.

> impression that he is offering a reduction from the price at which the product is generally sold in his trade area. If a number of the principal retail outlets in the area are regularly engaged in making sales at the manufacturer's suggested price, that price may be used in advertising by one who is selling at a lower price. If, however, the list price . . . . account[s] for only an insubstantial volume of sales in the area, advertising of the list price would be deceptive. (Emphasis added.)

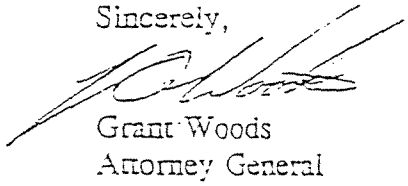
Thus, even if the advertisement states that savings are based on MSRP, if neither the retailer nor its competitors has made regular or substantial sales at the MSRP, the advertisement is deceptive, because consumers do not realize the savings represented. Arizona courts have interpreted the term deception to mean misleading "representations that have a 'tendency and capacity' to convey misleading impressions to consumers even though interpretations that would not be misleading also are possible." *Madsen v. Western American Mortgage Co.*, 143 Ariz. 614, 618, 694 P.2d 1228, 1232 (App. 1985).

Federal courts have reached the same result as the FTC. In *Giant Food, Inc. v. Federal Trade Comm'n*, 322 F.2d 977 (D.C. Cir. 1963), *cert. dismissed*, 376 U.S. 967 (1964), the court upheld the FTC's order to Giant Food to cease and desist from using the words "manufacturers' list price" and "suggested list price." Thus, Giant Food could use those terms only if it had regularly sold the product at that price in the recent, regular course of its business. Furthermore, Giant Food was prohibited "from referring to the 'manufacturer's list price' when that list price was not the usual and customary retail selling price of the product in the area." *Id.* at 979. *See also Regina Corp. v. Federal Trade Comm'n*, 322 F.2d 765 (3rd Cir. 1963) (court upheld FTC finding that the comparative use of "manufacturer's list price" was deceptive when that price was rarely, if ever, charged).

Conclusion

The use of a manufacturer's suggested retail price in comparison advertising is violative of the Arizona Consumer Fraud Act when neither the advertiser nor its competitors has made substantial or regular sales at that price.

Sincerely,



Grant Woods
Attorney General